

Groundwater Advisory Committee Meeting
Friday, June 3, 2005: 10:00 a.m. - 1:00 p.m.
Department of Natural Resources, Conference Room G09
101 South Webster, Madison

Agenda Item #6
Overview of Wisconsin Law of Groundwater Withdrawal

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- I. The current law governing groundwater withdrawal is primarily in two categories:
 - A. Common law.
 - B. Statutory law.
- II. Wisconsin Common Law of Groundwater Withdrawal
 - A. The common law of groundwater is governed by the "reasonable use" doctrine.
 - B. The doctrine applies to both groundwater "consumption" and to groundwater pollution.
 - C. The Wisconsin Supreme Court declared the present common law of groundwater withdrawal in *State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 302-303, 217 N.W.2d 339 (1974).
 - 1. "A possessor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless . . . the withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure"
 - 2. The Court overruled the common law stated in *Huber v. Merkel*, 117 Wis. 355, 357, 94 N.W. 354 (1903), "If the waters simply percolate through the ground, without definite channel, they belong to the realty in which they are found, and the owner of the soil may divert, consume, or cut them off with impunity."
 - D. The common law enables a landowner or the State to protect their rights and interests in groundwater and to bring actions against persons who cause harm to private or public rights as a result of unreasonable use or misuse of the water.
 - 1. E.g., the State may bring a public nuisance action against persons who unreasonably pump water from the ground causing a nuisance to a community or causing specific injury to public property, such as to state public trust lands or waters.
 - 2. The public trust doctrine is discussed below.

III. Wisconsin Statutory Law of Groundwater Withdrawal

- A. Wisconsin High Capacity Well Law [Wis. Stat. §§ 281.34 & 281.35]
- B. For all wells:
 - 1. DNR must be notified of the location of any proposed new well construction [§ 281.34(3)].
 - 2. DNR to administer program to mitigate adverse effects of existing wells in groundwater protection areas* [§ 281.34(8)(d)].
- C. High capacity wells (more than 100,000 gallons per day)
 - 1. Approvals
 - a. DNR must approve all high capacity wells, including all dewatering wells for a project [§ 281.34(2), (2m)].
 - b. See approval standards below.
 - 2. Registration

All wells that withdraw an average of more than 100,000 gallons per day in any 30-day period must be registered with the DNR.
 - 3. Reporting

All wells must report volumes withdrawn periodically with the DNR [§ 281.35(3)].
 - 4. Environmental review wells [§ 281.34(4)]
 - a. DNR EAs or EISs are required for high capacity wells that:
 - 1) are located in "groundwater protection areas,"* or
 - 2) "high water loss" wells that lose 95% of water withdrawn, or
 - 3) may have significant impacts on springs (defined as those that discharge 1 cfs 80% of the time).
 - b. Environmental Impact Reports (EIRs) may be required to be done by project proponents for high capacity wells that may impact these resources.
 - c. *Groundwater protection areas (GPAs) [§ 281.34(1)(a), (8)]
 - 1) Defined as
 - a) a designated outstanding resource water that is not a trout stream, or
 - b) a designated exceptional resource water that is not a trout stream, or
 - c) trout streams, except for farm drainage ditches without trout stream history.
 - 2) DNR to adopt rules to identify the type and quality of trout streams, including maps.
 - 3) DNR to identify GPA on request of high cap well applicants.
 - 5. High cap well approval standards [§281.34(5)]
 - a. DNR may not approve, or approve with limitations, high cap wells in order to:

- 1) assure, for all high cap wells, that public water utility supplies will not be adversely affected,
 - 2) assure, for environmental review wells, that significant environmental impacts will not occur.
 - b. Exception: A public utility well in a groundwater protection area or near a spring may be approved even if it causes significant environmental effects if:
 - 1) there is no reasonable alternative location for it, and
 - 2) conditions are imposed that balance the impacts with the public benefits of the well to public health and safety.
 - 3) [Utilities do not enjoy this exception for high water loss wells, which DNR must assure will not cause significant environmental effects.]
6. Preexisting approved high capacity wells [§ 281.34(6), (8)(d)]
 - a. Owners must report their location and annual pumping report.
 - b. DNR required to adopt reporting rules.
7. Well approvals may be modified or rescinded for failure to comply with well approval standards or conditions [§ 281.34(7)].
- D. 2 million gallons per day wells [§ 281.35]
 1. A person who wishes to construct or operate a well that withdraws an average of more than 2 million gallons per day within a 30-day period, in addition to the requirements for wells exceeding 100,000 gallons per day, must:
 - a) register the well,
 - b) report withdrawals, and
 - c) obtain approval from DNR.
 2. DNR may not approve wells that, inter alia:
 - a) impair public water utility supplies, or
 - b) impair public water rights or interests; or
 - c) impair Great Lakes or Mississippi River basin waters; or
 - d) conflict with plans for future water uses; or
 - e) cause adverse groundwater or interbasin transfer effects.
- E. 5 million gallons per day wells in Great Lakes Basin
 1. Applies to withdrawal on average in excess of 5 million gallons per day in a 30-day period in Great Lakes Basin.
 2. The governors and premiers of the states and provinces in the region must be notified, and their comments considered on the application.
- F. Rulemaking: DNR has rulemaking authority to implement the approval process.
- G. Groundwater Plan: DNR is required to submit by August 1, 1988, a groundwater resources plan to the Legislature with recommendations.

- H. Groundwater Management Areas [§ 281.34(9)]
 - 1. DNR to designate by rule 2 GMAs in
 - a. Brown County, and
 - b. Waukesha County,
 - 2. Where groundwater levels are 150 feet or more below natural levels.
 - 3. DNR to assist and advise planning agencies on managing water in these areas.
 - 4. DNR may adopt rules on management in GMAs if the Groundwater Advisory Committee created in 2003 Wis. Act 310 does not issue its report by January 1, 2007.
 - I. Other: coastal zone and intergovernmental cooperation provisions are also included.
- IV. Constitutional constraints on uses of groundwater.
- A. Constitutionally protected rights
 - 1. Taking of property without due process or just compensation
 - 2. Public trust doctrine
 - B. Property rights
 - 1. Laws that have the effect of taking a person's property without due process or compensation may be found to be unconstitutional.
 - 2. In a nuisance action, the Wisconsin Supreme Court observed, "To contend that a public utility, in the pursuit of its praiseworthy and legitimate enterprise, can, in effect, deprive others of the full use of their property without compensation, poses a theory unknown to the law of Wisconsin, and in our opinion would constitute the taking of property without due process of law." *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164, 177, 172 N.W.2d 647 (1969).
 - 3. Persons have property rights to reasonable use of groundwater
 - 4. Any law that has the effect of taking the right of water use without due process or protection of these rights is vulnerable to challenge.
 - C. The public trust doctrine of navigable waters
 - 1. The courts have yet to declare a "public trust doctrine" for groundwater.
 - 2. However, the public trust doctrine of navigable waters can reach beyond navigable waters where necessary to protect navigable waters.
 - a. E.g., In *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974), the Wisconsin Supreme Court held that the state had standing to bring a public nuisance action to enjoin polluting runoff from uplands into navigable waters.

- b. In *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), the Wisconsin Supreme Court acknowledged the public trust doctrine as a source of state authority to protect non-navigable shorelands and wetlands as a component of the state's *duty* to protect navigable waters.
 - 1) "The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty." 56 Wis. 2d at 18.
 - 2) Nexus: "This is not a case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm to public rights. Lands adjacent to or near navigable waters exist in a special relationship to the state." *Id.* "They . . . are subject to the state public trust powers" 56 Wis. 2d at 18-19.
 - 3) The same can be said of the nexus between groundwater and streams and lakes.
- c. High capacity wells below the state regulatory 2 million gallon/day threshold, for regulation for public rights purposes, can harm navigable waters and their headwaters.
- d. Remedies are judicial, case-specific, and reactive – not administrative, comprehensive, or preventive.

V. Groundwater supply challenges

- A. Groundwater supplies are limited and diminishing with demand.
- B. Demands on limited groundwater supplies are increasing without conservation or use efficiency standards.
- C. Groundwater use conflicts are increasing:
 - 1. between private and public users of groundwater;
 - 2. between users of groundwater and users of surface waters that are dependent on groundwater.
- D. Our regulatory laws do not cover all significant problems and issues relating to groundwater use and management.
- E. Lawsuits are not a good substitute for comprehensive and effective state policies and programs for managing our groundwater.
 - 1. Lawsuits are reactive to problems that already exist and are difficult to remedy.
 - 2. Policy can be anticipatory, preventive, and result in planned and less costly outcomes.